Subject

DDA-87-1968X

ROUTING AND TRANSMITTAL SLIP Date 18 SEP 87

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. C/IRMD/OIT		
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	Action		File		Note and Return
	Approval		For Clearance		Per Conversation
	As Requested		For Correction		Prepare Reply
	Circulate		For Your Information		See Me
	Comment		Investigate		Signature
	Coordination		Justify		

REMARKS

#1 - FOR ACTION: PLEASE RESPOND DIRECT

WITH DROP COPY TO THE DDA.

SUSPENSE: 30 OCTOBER 1987

cc: D/OS FOR INFO.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
STAT	Phone No.

5041-102 ☆ U.S. GPO: 1986—491-247/40012 **OPTIONAL FORM 41 (Rev. 7-76)** Prescribed by GSA FPMR (41 CFR) 101-11.206

STAT

Information Security Oversight Office
Washington, DC 20405

87-1968X

September 10, 1987

Dear Mr. Donnelly:

With the approach of the end of the fiscal year, it is again time for a reminder that you must provide the Information Security Oversight Office (ISOO) with your completed Standard Form 311, "Agency Information Security Program Data," for FY 1987, no later than Friday, October 30, 1987. These data serve a number of purposes, the most visible of which is their aggregated appearance in ISOO's Annual Report to the President. This Report is used by the Administration and the executive branch agencies, and by the Congress, the media and the interested public. Therefore, as managers of the Government-wide information security system, we must be cognizant of the critical role that these data play in support of the system's credibility and performance. Your continuing efforts to submit these data in a timely fashion are a very important part of this process.

On August 21, 1987, we wrote to you concerning the Standard Form 189, "Classified Information Nondisclosure Agreement." Among the other instructions in that letter, we noted that, until further notice, you must not withdraw a person's clearance nor deny his or her access to classified information solely as a consequence of his or her refusal to sign the SF 189. The purpose of this instruction is the temporary maintenance of the status quo with respect to each individual employee until there are further developments in the current litigation challenging the legality of the nondisclosure agreement. Among the follow-up questions that have been raised concerning this instruction, the most significant seems to be, "Assuming all other qualifying criteria are favorable, are we now required to issue a clearance and authorize access to classified information to someone who refuses to sign the SF 189?"

The answer to this question in most situations remains, "No, to the contrary." Persons who do not currently hold clearances and are not currently authorized access to classified information must execute the SF 189 before or concurrent with the granting of these considerations. Remember, the purpose of the moratorium announced in the letter of August 21, is the temporary maintenance of the status quo for individual employees, and has no bearing on the issuance of new or additional access clearances. Only in the very unusual situation in which your

agency has already made an unqualified commitment to an individual, the withdrawal of which will clearly disrupt the status quo, may you grant a temporary clearance or authorize access temporarily to someone who now refuses to sign the nondisclosure agreement. In such an instance, you must advise the person that the clearance and access will eventually be withdrawn unless he or she executes the nondisclosure agreement. You should also brief the person individually on his or her responsibility to protect the information from unauthorized disclosure and the consequences that may follow from his or her failure to meet this responsibility. Further, to avoid misunderstandings in the future, all job announcements for positions that require a classified information clearance should include a statement that the successful candidate will be required to execute a nondisclosure agreement.

Because of this and other questions, with our August 21 letter we also announced a question and answer briefing regarding the SF 189 that we scheduled for September 3. We very much regret that, for reasons beyond our control that pertain to the current litigation, we were forced to cancel this briefing. We still believe that such a briefing may be quite useful, but have also concluded that the current situation does not permit a large briefing in an auditorium setting. Therefore, ISOO is prepared to offer smaller, conference room sized question and answer briefings to prearranged agency audiences if there is a demand for them. To make arrangements for such briefings, please have your agency's liaison to ISOO get in touch with his or her ISOO point of contact. In the interim, we enclose a copy of an ISOO Fact Sheet on SF 189 that we had planned to distribute on September 3.

Sincerely,

Steven Garfinkel

Steven Garfinkel
Director

Mr. William F. Donnelly
Deputy Director for Administration
Central Intelligence Agency
Washington, DC 20505

Enclosure

Information Security Oversight Office
Washington, DC 20405

FACT SHEET ON STANDARD FORM 189
CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

STATUS AS OF SEPTEMBER 2, 1987

I. WHAT IS ISOO?

The Information Security Oversight Office (ISOO) was established by Executive Order 12065 and continued under Executive Order 12356, issued by President Reagan on April 2, 1982. ISOO is responsible for monitoring the information security programs of all of the approximately 68 departments, independent agencies and offices within the executive branch that generate or handle national security information.

ISOO is an administrative component of the General Services Administration but receives its policy direction from the National Security Council. The ISOO Director is appointed by the Administrator of General Services with the approval of the President. The ISOO Director has the authority to appoint its staff, which currently numbers 13 persons.

Among its oversight responsibilities ISOO develops and issues implementing directives; conducts onsite inspections; gathers, analyzes and reports statistical data; develops and disseminates security education materials; receives and takes action on suggestions and complaints on the administration of the Order; conducts special program studies; considers declassification appeals on presidential materials; and reports annually to the President on the status of the Government's information security program. In National Security Decision Directive 84, the President directed ISOO to develop and issue a standardized classified information nondisclosure agreement.

II. WHAT WAS THE BACKGROUND OF NSDD-84?

On March 11, 1983, the President issued National Security Decision Directive 84 (NSDD-84), entitled "Safeguarding National Security Information." NSDD-84 deals with unauthorized disclosures of classified information. It is based on a draft prepared by an interdepartmental group convened by Attorney General William French Smith at the request of William P. Clark, then Assistant to the President for National Security Affairs. It was convened following White House concerns about the continuing problem of unauthorized disclosures of classified information. Richard Willard, now the Assistant Attorney General, Civil Division, served as chairman of this group, which also included representatives of the Departments of State, Treasury, Defense and Energy, and the Central Intelligence Agency. The group met throughout February and March 1982, and issued its Report on March 31, 1982. The President acted upon the group's recommendations when the problem of unauthorized disclosures persisted over the ensuing months.

III. HOW WAS THE SF 189 DEVELOPED?

National Security Decision Directive 84 (NSDD-84) requires that all persons having access to classified information sign a nondisclosure agreement as a condition of receiving access. It directed ISOO to develop a legally enforceable standardized nondisclosure agreement. To fulfill this responsibility, the Director of ISOO chaired an interagency working group that assisted him in developing the draft form. The group included representatives designated by the Secretaries of State, Treasury, Defense and Energy, the Director of Central Intelligence, and the Attorney General. The interagency group met throughout March, April, May, and June 1983. The draft agreement was based on existing forms, approved by the Department of Justice, that performed a similar function for particular agencies. The group also drafted a standardized nondisclosure agreement for Sensitive Compartmented Information that included a mandatory prepublication review provision.

On July 1, 1983, the Director of ISOO transmitted the draft nondisclosure agreement, which reflected the consensus of the interagency group, to the Department of Justice for its determination on enforceability. Upon receiving the concurrence of the Justice Department, ISOO proceeded with the printing and distribution of the SF 189, "Classified Information Nondisclosure Agreement." The SF 189 was printed in August 1983, and its implementation began with the publication in the Federal Register on September 9, 1983, of its implementing regulation.

IV. WHAT IS THE CURRENT STATUS OF IMPLEMENTATION OF THE SF 189?

In September of 1983, ISOO issued SF 189, "Classified Information Nondisclosure Agreement," and directed agencies to proceed with implementation expeditiously.

There are approximately 3.5 million Government and private industry personnel who are cleared for access to classified information. About 1.2 million are contractor personnel, most of whom are expected to sign SF 189-A, the alternate nondisclosure agreement for industry issued in November 1986. As of August 29, 1987, 1,738,319 civilian and military personnel in the federal workforce have signed the SF 189. Only 661,401 personnel have yet to sign the Agreement. These numbers are somewhat inflated by the inclusion of some persons who have signed the form or were being asked to sign the form although they are not cleared for access to classified information. This practice has been halted. ISOO has requested that it be provided as soon as possible with data that do not include uncleared personnel.

As it concerns the SF 189-A, approximately 80,613 industry personnel have signed it, while slightly more than 1 million personnel have not. All contractor personnel covered under the Defense Industrial Security Program are expected to have executed either the SF 189 or 189-A by the end of 1988.

Attached are five graphic displays depicting various aspects of the status of implementation of the SF 189. Again, some of these numbers are slightly inflated by the inclusion of uncleared persons. The graphs include:

Number of Persons Required to Sign the SF 189

Comparison of Signed Agreements vs. Agreements to be Signed

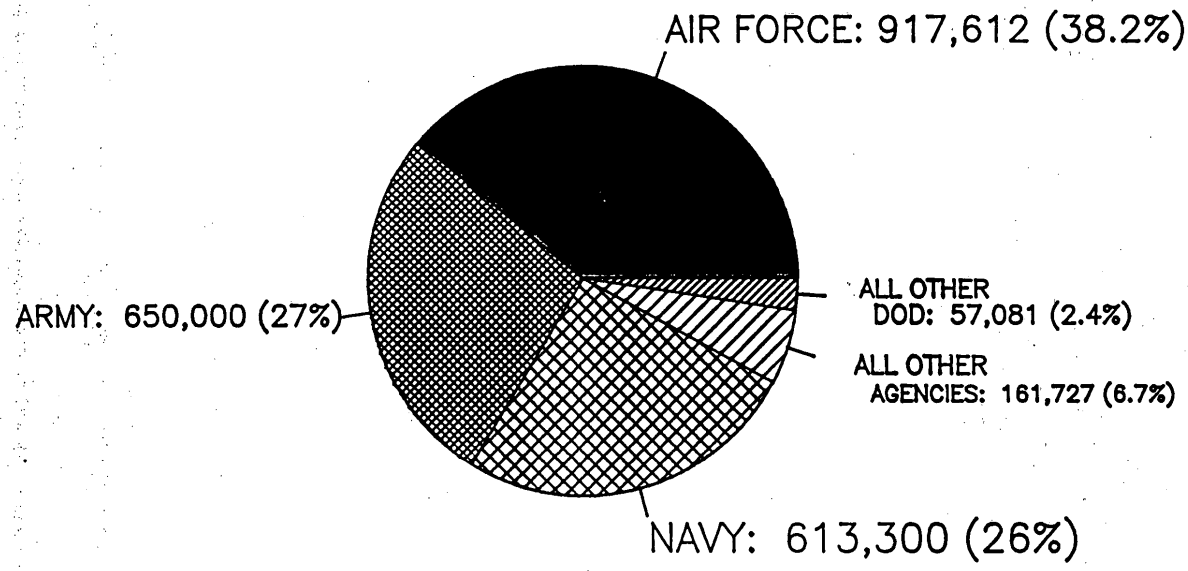
Signatories vs. Signature Refusals

Number of Signed Agreements

Number of Agreements to be Signed

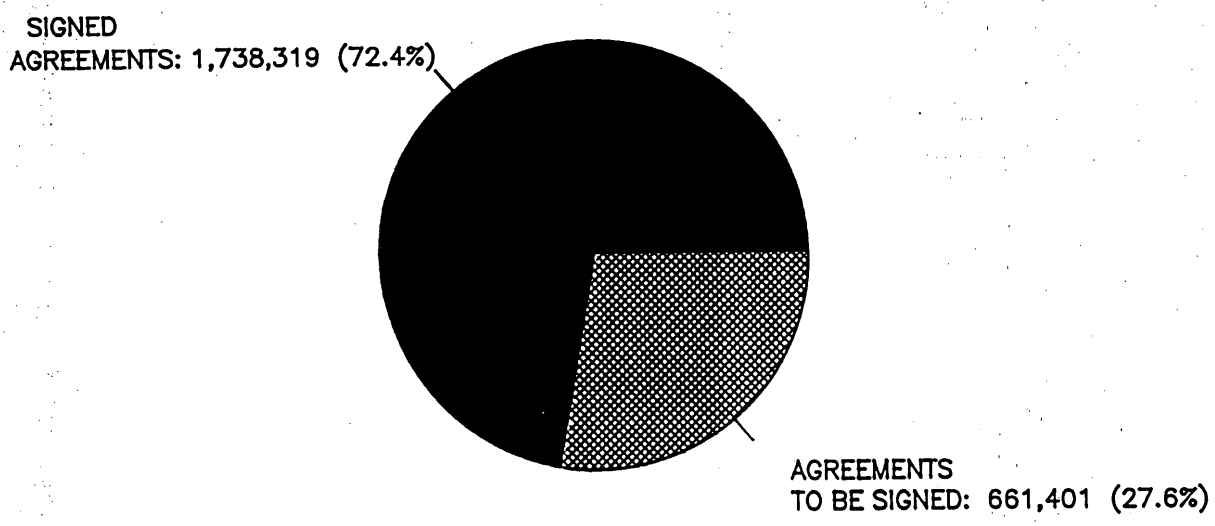
NUMBER OF PERSONS REQUIRED TO SIGN THE SF 189

(TOTAL REQUIRED TO SIGN = 2,399,720 PERSONS)



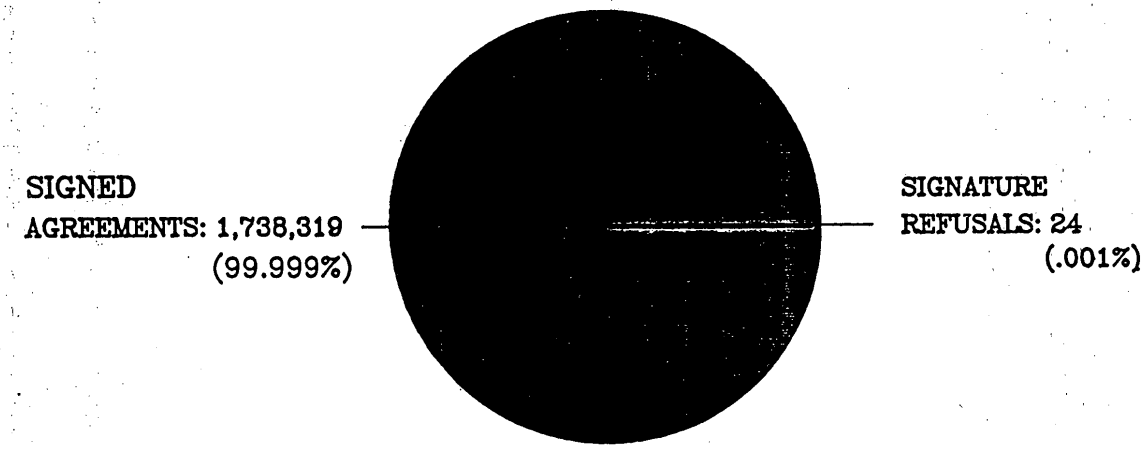
COMPARISON

SIGNED AGREEMENTS VS. AGREEMENTS TO BE SIGNED

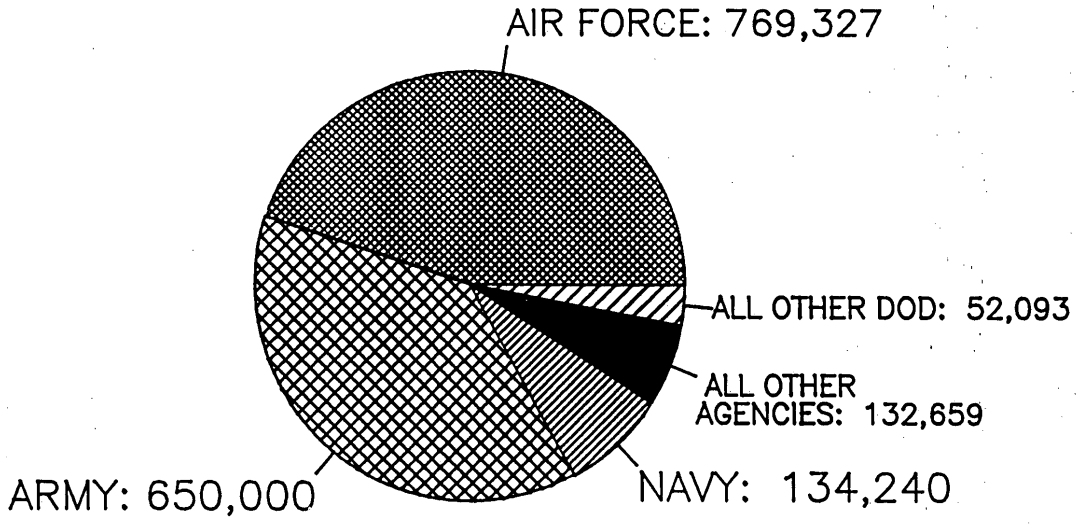


STATUS OF IMPLEMENTATION
SF 189

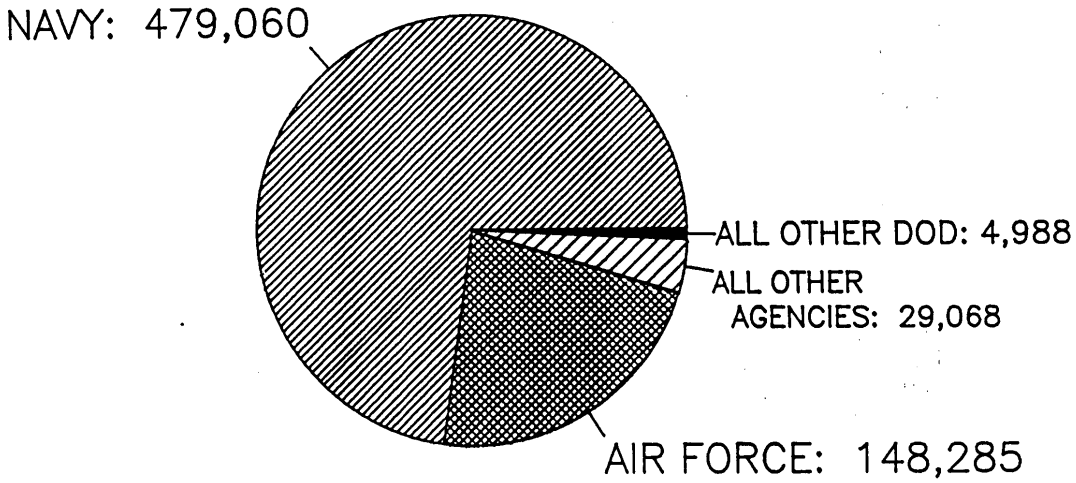
SIGNATORIES VS. SIGNATURE REFUSALS



NUMBER OF SIGNED AGREEMENTS



NUMBER OF AGREEMENTS TO BE SIGNED



Declassified in Part - Sanitized Copy Approved for Release 2011/12/07 : CIA-RDP89G00643R001000100027-6

V. WHY HAS THERE BEEN SO MUCH DELAY IN THE EXECUTION OF THE SF 189 WITHIN THE DEPARTMENT OF STATE AND ELEMENTS OF THE DEPARTMENT OF THE DEFENSE?

The drafters of NSDD-84 believed that most DoD and State Department personnel with access to classified information had already signed nondisclosure agreements; therefore, it was initially thought that the burden of implementation, given the numbers and geographical dispersion of their personnel, should only extend to new employees. These agencies delayed immediate implementation based on this assumption. However during implementation it became clear that most Defense and State employees had never signed a nondisclosure agreement at all comparable to the SF 189. As a result, it was agreed that the implementation of the SF 189 must involve current employees also. However, agency programs were not sufficiently developed to obtain full compliance rapidly.

To ease the burden of implementation on the DoD and State, an agreement was reached to allow these agencies three years from the end of 1984 to fully implement the SF 189.

VI. WHAT IS THE STATUS OF NSDD-84'S OTHER MAJOR PROVISIONS?

NSDD-84 directed that other major steps be taken by all executive branch agencies to curb unauthorized disclosures of classified information. These included the issuance of an alternative Sensitive Compartmented Information (SCI) nondisclosure agreement, developing policies and procedures for the use of the polygraph, and reviewing the Executive order on personnel security. The current status of each of these items is as follows:

- Alternative SCI Nondisclosure Agreement

  The Department of State Authorization Bill of October 20, 1983, banned the implementation of the alternative SCI nondisclosure agreement for six months. On February 15, 1984, the President announced his intention to suspend indefinitely provisions of the directive pertaining to polygraph and prepublication review (the SCI agreement).

- Polygraph Policy and Procedures

  The polygraph provisions of NSDD-84 remain in abeyance. Other polygraph use provisions have been negotiated between executive branch agencies and Congress. The effectiveness and use of polygraph testing is the subject of a current executive branch study based on a subsequent NSDD.

- Federal Personnel Security Program

  An interdepartmental group chaired by the Department of Justice, in consultation with the Director, Office of Personnel Management, developed a proposed draft Executive order revising the federal personnel security program. The draft is currently pending in the Office of the Attorney General.

VII. WHAT IS THE SF 189-A? HOW AND WHY WAS IT DEVELOPED?

The SF 189-A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government)" is a nondisclosure agreement between the United States Government and Government contractor, licensee, and grantee employees, or other non-Government personnel requiring access to classified information in the performance of their duties. These employees must sign either the SF 189-A or the SF 189 before being authorized access to classified information.

The DoD recommended development of the SF 189-A as an adaptation of the SF 189, to facilitate industry implementation. The form was developed jointly by the ISOO, and representatives of the DoD. Almost all the SF 189-A is identical to the SF 189. The major differences are:

A. The term "classifiable" in the SF 189-A was deleted. Contractors do not classify originally. By contract, it's the Government's responsibility to identify what information is classified.

B. The second sentence in paragraph 3 of the SF 189-A was changed from "last granting me a security clearance," to "responsible for the classification of the information." The revised language takes into account: (1) the absence of an employer/employee relationship between the Government and the contractor employee; (2) the lack of contractor employee classification authority; and (3) the fact that some contractor employees are cleared for access by more than one Government agency.

C. References to statutory provisions applicable only to Government employees were deleted from the SF 189-A.

D. The debriefing acknowledgment portion of the SF 189-A was added to facilitate maintenance and retrieval.

VIII. WHAT CONTROVERSY SURROUNDED THE SF 189 UNTIL THE SPRING OF 1987?

Until this recent controversy, the SF 189 has engendered very little controversy, especially considering its scope and the fact that it deals with leaks of classified information. SF 189 received little attention during the congressional hearings on NSDD-84 and none of the resulting legislative action pertained to the nondisclosure agreement.

The SF 189 was the subject of extensive discussion between the ISOO and the American Civil Liberties Union (ACLU). The ACLU indicated repeatedly that it had no plans to challenge the facial validity of the SF 189.

Over the course of four years ISOO had approximately two or three dozen people question particular provisions of SF 189. ISOO provided both oral and written responses to their questions. Until the current situation, all persons provided these explanations signed the agreement.

Until the National Federation of Federal Employees brought suit in the United States District Court for the District of Columbia on August 17, 1987, there had been no litigation. No one had been subject to a criminal or civil action for violating the provisions of the SF 189. Further, ISOO is not aware of any person who has lost employment for failure to sign the SF 189, although a small number of persons have lost their clearances after failing to sign the agreement.

IX. HOW DID THE CURRENT CONTROVERSY ARISE?

The current controversy over the Standard Form 189 began when Air Force employee A. Ernest Fitzgerald was first asked to execute the nondisclosure agreement in January 1987. Mr. Fitzgerald refused to sign the form at that time, stating that he needed more information about it. Over the next months he sought this information through successive inquiries to the Air Force, the Department of Defense and the ISOO.

Mr. Fitzgerald was on part-time detail to the staff of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, both chaired by Representative John D. Dingell. Starting in May 1987, following a meeting between Mr. Fitzgerald and other members of the Subcommittee staff and ISOO Director Steven Garfinkel, several members of the House and Senate directed letters to the White House, the Office of Personnel Management and ISOO questioning the legality of a number of aspects of the SF 189, which are addressed in the following section. These letters were also released to the news media, which commenced a series of news articles, stories, op-ed pieces and editorials on the nondisclosure agreement, almost all of which contained serious errors of fact. This media attention, in turn, led to constituent correspondence to other members of Congress, more congressional inquiries, more media attention, etc. Within a couple of months, the situation, which began with one person out of almost two million, had snowballed into a major controversy. Fueling the controversy have been a number of gross misrepresentations and misunderstandings about the SF 189 that have appeared repeatedly in both the media accounts and congressional pronouncements. Administration efforts to defuse the situation through many channels have not yet been successful.

On August 17, 1987, the National Federation of Federal Employees, a Federal employee labor union, filed suit in the Federal District Court for the District of Columbia challenging the constitutionality and legality of the SF 189. The lawsuit seeks a declaratory judgment that the form violates the First (free speech) and Fifth (due process) Amendments to the Constitution and an injunction which bars the executive branch from using the SF 189 and any other form that prohibits the disclosure of "classifiable" information. The Department of Justice is proceeding as quickly as possible to defend the Government's position and the Administration is confident that it will ultimately prevail on the merits.

In its September 2, 1987, edition The Washington Post reported that the American Federation of Government Employees filed suit against the Government challenging the constitutionality of the SF 189 and of Form 4193. Form 4193 is a nondisclosure agreement for sensitive compartmented information.

X. WHAT ARE THE MAJOR POINTS OF CONTENTION?

A. WHAT IS "CLASSIFIABLE INFORMATION?"

As used in paragraph 1 of SF 189, the term "classifiable information" refers to information that meets all the requirements for classification under Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security, but which, as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information. A party to SF 189 would violate its nondisclosure provisions only if he or she disclosed without authorization classified information or information that he or she knew, or reasonably should have known, was classified, although it did not yet include required classification markings. The term "classifiable" does not include any information that is not otherwise required by statute or Executive order to be protected from unauthorized disclosure in the interest of national security.

For example, a person attending a classified meeting should reasonably know that his or her unmarked notes of that meeting may not be disclosed to a person who doesn't have a clearance and a "need-to-know" that information. In testimony before a Senate subcommittee studying NSDD-84, former CIA Director William Colby alluded to the fact that raw intelligence data are often unmarked as classified when they are first received, yet may very well involve some of the most sensitive information within the Government, such as the names of intelligence sources.

Also, with respect to the term "classifiable," critics have repeatedly leveled the charge that it would subject employees to sanction for disclosing information that was clearly unclassified at the time of disclosure, but was subsequently classified. This argument suggests that it would require employees to speculate about the future classification of information although they themselves may not be original classifiers. This contention completely overlooks the definition of "classifiable" as used in the SF 189. As noted above, "classifiable" refers to unmarked information that already is classified, or meets the standards for classification and is in the process of being classified. It

does not refer to unclassified information that might, perchance, be classified sometime in the future. The only fact patterns in which an employee might be held liable for disclosing unclassified information could occur when the employee knows, or reasonably should know, that the information is in the process of a classification determination and requires interim protection as provided in Section 1.1(c) of Executive Order 12356. For example, if an employee is aware that particular unclassified information has been formally referred to an original classifier for classification action, he or she would very likely violate the SF 189 if he or she were to disclose the information without authorization in the interim.

Critical to the concept of liability for disclosing "classifiable" information is the knowledge requirement on the part of the offending party. To be liable, either that party knows that the unmarked information is classified, in which case the unauthorized disclosure is willful, or the party reasonably should know that the unmarked information is classified, in which case the unauthorized disclosure is negligent. This is fully consistent with the requirements of Executive Order 12356, which provides at Section 5.4(b)(1): "Officers and employees of the United States Government, and its contractors, licensees, and grantees shall be subject to appropriate sanction if they . . . knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under this Order or predecessor orders . . . ." The existence or non-existence of negligence, as is true in any negligence situation, would be determined by the particular facts of the case. However, in no instance could an employee be found liable for violating the nondisclosure provisions of the SF 189 by disclosing unmarked information when there was no basis to suggest, other than pure speculation, that the information was classified or in the process of being classified.

B. WHAT IS AN "INDIRECT" UNAUTHORIZED DISCLOSURE?

As used in paragraph 3 of SF 189 and SF 189-A, the word "indirect" refers to any situation in which the knowing, willful or negligent action of a party to the agreement results in the unauthorized disclosure of classified information even though the party to the agreement does not directly communicate, deliver or transmit classified information to a person who is not authorized to receive it. A party to SF 189 would violate its nondisclosure provisions only if he or she knew, or reasonably should have known, that his or her action would result, or reasonably could result in the unauthorized disclosure of classified information. ISOO has made regulatory changes defining the meaning of the term "indirect unauthorized disclosure." (See Federal Register, Vol. 52, p. 28802, dated August 3, 1987.)

There are any number of hypotheticals that might constitute an indirect unauthorized disclosure. Here are several examples:

An employee works in an area that is not secured and which is accessible to uncleared personnel. He goes home for the evening, leaving clearly marked classified documents on top of his desk. A reporter walking through the area spots the classified documents, reads them, and files a story on the classified information that is published. The negligent employee has very likely committed an indirect unauthorized disclosure.

An employee reads a news article that speculates about a classified subject. The employee, as a result of his authorized access to classified information, is aware of the accuracy of the information. The employee then advises a party who does not have a clearance and a "need-to-know" that accurate information about a classified subject is revealed in a news article, which the employee cites. The employee has very likely committed an indirect unauthorized disclosure.

An employee tells a co-worker on a classified project that he believes their work is contrary to the goal of world peace. The co-worker agrees, and states that he has a journalist friend who would gladly expose it. The employee provides his co-worker with classified information to leak to the journalist, who then has it published. The co-worker has committed a direct unauthorized disclosure, while the employee, although providing classified information directly only to his cleared co-worker, has committed an indirect unauthorized disclosure.

C. DOES THE SF 189 CONFLICT WITH "WHISTLEBLOWER" STATUTES?

The SF 189 does not conflict with the so-called "whistleblower" statutes (5 U.S.C. § 2302). These statutes specifically do not protect persons who disclose classified information without authorization. The reference in these statutes to information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs" is without question a reference to the contemporary Executive order on national security information, which is now E.O. 12356. In turn, SF 189 defines classified information as "information that is either classified or classifiable under the standards of Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security." Future reprints of the SF 189 will explicitly state that the Agreement does not supersede the provisions of the "whistleblower" statutes.

In addition, E.O. 12356, Sec. 1.6(a) specifically prohibits classification "in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security." This provision was included in the Executive order to help prevent the classification of information that would most likely be the concern of whistleblowers.

Finally, there are remedies available to whistleblowers that don't require the unauthorized disclosure of classified information. There are officials within the government who are both authorized access to classified information and who are responsible for investigating instances of reported waste, fraud and abuse. Further, each agency has designated officials to whom challenges to classification may be addressed or to whom a disclosure of classified information is authorized. For example, within the Department of Defense employees are now required to challenge the classification of information that they believe is not properly classified. Special procedures have been established to expedite decisions on these challenges.

D. IS THE SF 189 CONSTITUTIONAL?

Although the constitutionality of SF 189 has yet to be resolved in court, nondisclosure agreements even more stringent in their restrictions have consistently been upheld by the Federal courts, including the Supreme Court, as legally binding and constitutional. At every stage of the development and implementation of the SF 189, experts in the Department of Justice have reviewed its constitutionality and enforceability under existing law.

E. DOES THE SF 189 REQUIRE PREPUBLICATION REVIEW?

The SF 189 contains no requirement for prepublication review. This omission resulted from the specific design of its drafters, since NSDD-84 was silent on the inclusion or non-inclusion of a prepublication review provision for this nondisclosure agreement.

The ability of the Government to seek injunctive relief to prevent the publication of classified information is not, as a few people have suggested, an implied imposition of a blanket prepublication requirement. It is untenable to suggest that the Government, if it is aware that an employee or former employee is about to disclose classified information, should not consider every lawful means to protect the nation's security. However, the possibility of infrequently seeking injunctive relief in no practical or even theoretical sense equates to mandatory prepublication review for every publication of every signer of the SF 189.

F. WHAT OTHER LANGUAGE IN SF 189 IS UNCLEAR?

The first line of paragraph 7 of the SF 189 reads: "I understand that all information to which I may obtain access by signing this form is now and will forever remain the property of the United States Government." The SF 189-A, composed over three years later, includes the word "classified" before the word "information." It has been suggested by a few persons that the SF 189, therefore, imposes a much broader standard.

To the contrary, the first sentences of both agreements mean precisely the same thing. Information to which someone "may obtain access by signing [the SF 189]" is, by definition, "classified information." As further stated in the first sentence of the agreement, ". . . I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information." [Emphasis added.] The drafters of the SF 189 did not include the word "classified" in the first sentence of paragraph 7 because they believed it to be redundant. At the urging of the Department of Defense, it was later included in the SF 189-A, notwithstanding its redundancy, in order to preclude any possibility whatsoever of misunderstanding.

The third sentence of paragraph 7 reads in part: "I agree that I shall return all materials which have, or may have, come into my possession or for which I am responsible because of such access . . .." For the same reasons addressed above, it is clear that "all materials," by definition, refers only to "classified" materials. It is far less clear what is meant by the phrase, "or may have." The current language of this phrase was suggested by the Department of Justice after the interagency drafting group had completed its work on what was to become the SF 189. A detailed review of the records also reveals that the Department suggested slightly different, but far clearer language for the comparable provision of the Sensitive Compartmented Information Nondisclosure Agreement: "I agree that I shall return all materials which have or may come into my possession or for which I am responsible because of such access . . .." It now appears that Justice intended that the phrase "may have come" should actually have read "may come" in what was to become the SF 189 as well. ISOO has modified the rule that implements the use of SF 189 and SF 189-A to clarify these ambiguities. (See Federal Register, Vol. 52, p. 28802, dated August 3, 1987.)

XI. WHAT ACTIONS HAS ISOO TAKEN TO RESOLVE THE CURRENT CONTROVERSY?

To resolve the current controversy surrounding misunderstanding and ambiguities in the language of the SF 189, ISOO has taken a series of actions. Below is a brief summary of the nature of these actions and what they are expected to accomplish.

1. Meaning of "classifiable information"

Prior to the current controversy, ISOO had defined "classifiable information" through correspondence in response to individual inquiries. Now, to regulate formally the meaning of "classifiable information," on August 3, 1987, ISOO has defined the term in the Federal Register as "information that meets all the requirements for classification under Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security, but which, as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information. A party to SF 189 would violate its nondisclosure provisions only if he or she disclosed without authorization classified information or information that he or she knew, or reasonably should have known, was classified, although it did not yet include required classification markings."

On August 11, ISOO issued a further regulatory clarification, noting that "the term 'classifiable' does not include any information that is not otherwise required by statute or Executive order to be protected from unauthorized disclosure in the interest of national security." In written notices dated August 4 and 21, ISOO informed executive branch agencies of these regulatory changes. This definition of "classifiable information" is being added to the second sentence of paragraph 1 in the SF 189. Future reprints of the SF 189 will include this addition. Agencies have been advised that employees may add this language to current editions of SF 189.

2. Meaning of "indirect" unauthorized disclosure

To regulate formally the meaning of an "indirect" unauthorized disclosure, ISOO defined the term in the Federal Register on August 3, 1987, as "any situation in which the knowing, willful or negligent action of a party to the agreement results in the unauthorized disclosure of

classified information even though the party to the agreement does not directly communicate, deliver or transmit classified information to a person who is not authorized to receive it. A party to SF 189 would violate its nondisclosure provisions only if he or she knew, or reasonably should have known, that his or her action would result, or reasonably could result in the unauthorized disclosure of classified information."

ISOO informed executive branch agencies of this clarification in a letter to agency senior officials dated August 4, 1987. The definition is being added to the first sentence of paragraph 3 of SF 189 and SF 189-A. Future reprints of the SF 189 and the SF 189-A will include this addition. Agencies have been advised that employees may add this language to current editions of SF 189.

3. Conflict of SF 189 with "Whistleblower" statutes

The SF 189 does not conflict with the so-called "whistleblower" statutes (5 U.S.C. §2302). To end any confusion on this issue, the following statement is being added to the end of paragraph 4 of SF 189: "I understand that this Agreement does not supersede the provisions of Section 2302, Title 5, United States Code, which pertain to the protected disclosure of information by Government employees." Future reprints of SF 189 will include this statement. ISOO notified agencies of this addition on August 4, 1987. Agencies have been advised that employees may add this language to current editions of SF 189.

4. Conflict of SF 189 with constitutional provisions

The Administration is confident that the SF 189 fully complies with all constitutional and legal standards. On August 17, 1987, the National Federation of Federal Employees brought suit in the United States District Court for the District of Columbia challenging the constitutionality and legality of the Agreement. Pending some resolution of the issues in this litigation, on August 21, 1987, ISOO provided agencies with instructions concerning the execution and implementation of SF 189. The instructions require agencies to place a moratorium on withdrawal of clearances or denial of access solely on basis of refusing to sign SF 189 and to provide individualized briefings for those who refuse to sign the SF 189 but retain clearances. The letter also instructs agencies that these instructions are temporary and that they should continue with implementation of the SF 189.

In its September 2, 1987, edition The Washington Post reported that the American Federation of Government Employees filed suit against the Government challenging the constitutionality of the SF 189 and of Form 4193. Form 4193 is a nondisclosure agreement for sensitive compartmented information issued by the Central Intelligence Agency.

5. Prepublication review

The SF 189 contains no requirement for prepublication review. Therefore, no action was necessary.

6. Other unclear language

The first line of paragraph 7 of SF 189 reads: "I understand that all information to which I may obtain access by signing this form is now and will forever remain the property of the United States Government." The SF 189-A, composed over three years later, includes the word "classified" before the word "information." To correct the inconsistency in the language of the two forms, ISOO has added the word "classified" before the word "information" in the first sentence of paragraph 7 of SF 189. ISOO published this change in the Federal Register on August 3, 1987, and notified executive branch agencies of the change in a written notice dated August 4, 1987. Future reprints of SF 189 will reflect this change. Agencies have been advised that current editions of the SF 189 may be amended to reflect this change.

The third sentence of paragraph 7 of SF 189 and SF 189-A reads in part: "I agree that I shall return all materials which have, or may have, come into my possession or for which I am responsible because of such access . . . ." By definition "all materials" refers only to "classified" materials. As it concerns the meaning of the phrase "or may have," it appears that the phrase should have read "may come." To clarify the meaning and intent of this language ISOO published these changes in the Federal Register on August 3, 1987, and notified executive branch agencies of these changes in a written notice dated August 4, 1987. Additionally, the word "classified" has been added before the word "materials" in the third sentence of paragraph 7 of SF 189 and SF 189-A. In the same sentence and paragraph of both forms, the second "have" from the phrase "which have, or may have come into my possession" has been deleted. Future reprints of SF 189 and SF 189-A will reflect these changes. Agencies have been advised that current editions of the SF 189 may be amended to reflect this change.

7. Other changes

Future reprints of SF 189 will include the Witness and Acceptance block and Security Debriefing Acknowledgement block which currently appear in SF 189-A. The addition of the Witness and Acceptance block is intended to clarify the role of the witness and the role of the acceptor for the Government. By adding the optional Security Debriefing Acknowledgement block, SF 189 will provide for the acknowledgement of both a security debriefing and a security briefing.